No. 80-1095

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAURICE E. BAKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners are six former employees of the Central Intelligence Agency whose employment with the agency terminated in 1973 and 1974 (Pet. App. 1a-2a). Their separations were part of a 1973 reduction in force designed to affect approximately 700 excess CIA employees. The CIA terminated petitioners' employment pursuant to Headquarters Regulation 20-27 (rev. 31 Mar. 1970), which was promulgated under the authority of Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (Pet. App. 2a n.1). That statute empowers the Director of Central Intelligence, "[n]otwithstanding the provisions * * * of any other law," to terminate in his discretion "the employment

of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States * * *."

In June 1979, almost six years after their separation from service, petitioners filed this suit in the United States Court of Claims, seeking back pay and incidental relief. Petitioners claimed that Section 102(c) applies solely to the termination of national security risks. Because they were terminated as surplus personnel, petitioners argued that they are entitled to the protections of the Veterans' Preference Act of 1944, 5 U.S.C. 3502, which would otherwise be preempted by Section 102(c). In July 1980, the Court of Claims granted the government's motion for summary judgment, rejecting petitioner's narrow construction of Section 102(c) (see Pet. App. 1a-4a). The Court of Claims observed that Section 102(c) has been "broadly interpreted" and that " 'this statute and regulation g[i]ve the Director of the Central Intelligence Agency the absolute right to terminate any employee whenever he deem[s] it necessary or advisable' " (Pet. App. 4a, quoting *Rhodes* v. *United States*, 156 Ct. Cl. 31, 36, cert. denied, 371 U.S. 821 (1962)). On October 3, 1980, the Court of Claims denied petitioners' motion for rehearing en banc (Pet. App. 5a).

2. Petitioners contend (Pet. 6-18) that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), applies solely to the dismissal of CIA employees on national security grounds. The Court of Claims correctly rejected that claim, and its decision is consistent with the uniform view of the lower courts and does not conflict with any decision of this Court. Accordingly, further review is unwarranted.

The provisions of Section 102(c) are sweeping, expressly investing the Director of the CIA with "discretion" to terminate the employment of any officer or employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." Nothing in the broad

language or legislative history of Section 102(c) suggests that the Director may exercise his discretion solely with regard to national security risks.[1] Accordingly, and consistent with the CIA's longstanding administrative practice, the lower courts have repeatedly concluded that, regardless of whether an employee is a national security risk, the Director has "broad discretion [under Section 102(c)] to terminate employees in the interest of the United States." *Torpats* v. *McCone*, 300 F. 2d 914, 915 (D.C. Cir.), cert. denied, 371 U.S. 886 (1962). See, *e.g.*, *Rhodes* v. *United States*, *supra*, 156 Ct. Cl. at 36.[2]

Moreover, petitioners' narrow construction of Section 102(c) would undermine the congressional purpose informing that statute and the National Security Act as a whole. In order to ensure an effective CIA, Congress empowered the Director to make personnel decisions without regard to other employment laws such as the Veterans' Preference Act. Petitioners, on the other hand, would require the Director

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[1]Petitioners acknowledge (Pet. 11 n.6) that "the published hearings, committee reports, and floor debates" on Section 102(c) offer no support for their position. Instead, they rely (Pet. 10-11) on the current recollection of an individual who allegedly was present during one of several non-public committee sessions regarding the Act, which were held in 1947. In addition, petitioners rely on statements made regarding the so-called McCarran Rider, passed by Congress a year earlier, which concerned the State Department's authority to terminate employees. These statements are entitled to no weight as to the meaning of Section 102(c), and may not, in any event, override the plain meaning of the Act.

[2]*Cole* v. *Young*, 351 U.S. 536 (1956), is not to the contrary. That case involved the construction of the Act of August 26, 1950, ch. 803, 64 Stat. 476, which gave various agencies the authority to dismiss employees "in the interest of the national security." Section 102(c), in contrast, concerns the CIA alone, and empowers the Director to terminate employment "whenever he shall deem such termination necessary or advisable in the interests of the United States * * * ." 50 U.S.C. 403(c).

to establish a national security basis for any personnel decisions taken pursuant to Section 102(c). Such a requirement would limit the flexibility of the Agency and would interfere with the secrecy that is essential to the CIA's operations. Indeed, this litigation itself has resulted in the compromise of one classified document, the creation of another, and the divulgence of still other classified information concerning a CIA employee. See Defendant's Reply to Plaintiffs' Response to Defendant's Motion For Summary Judgment at 9 n.4.

In addition, petitioners' interpretation of Section 102(c) would harm the interest of past, current, and future CIA personnel. The Director of the CIA has long concluded that Section 102(c) authorizes the termination of personnel on any rational ground. Such a dismissal bears no stigma for the dismissed employee. In fact, Section 102(c) expressly provides that "such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government * * * ." 50 U.S.C. 403(c). Petitioners, on the other hand, would require the Director effectively to declare any employee dismissed pursuant to Section 102(c) to be a national security risk—a result that Congress apparently sought to avoid.[3]

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[3]We further note, as we argued in the court below, that petitioners' belated claims for six years' back pay are barred by laches. See, *e.g.*, *Brundage* v. *United States*, 504 F. 2d 1382, 1384 (Ct. Cl. 1974). Furthermore, petitioners Baker, Perry, Daum and Loiacono have no claim against the Agency since they either retired or resigned and thus were not involuntarily separated from service, and since they failed to exhaust their administrative remedies. In light of its construction of Section 102(c), the Court of Claims did not address these points.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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